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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 387.

RUTH J. HENKEL, AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL E. P. HENKEL, DECEASED, *Appellant,*

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, *Appellee.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

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INDEX.

	Page.
Statement of Case	1
Assignments of Error	2
Argument	3
Conclusion	9

CASES CITED.

Bone vs. Walsh Construction Co., 255 Fed. 901 (Dist. Ct. Ia.)	4
Business Men's Assur. Co. of America vs. Campbell, 18 Fed. (2d) 223 (8th C. C. A.)	7
Etheridge vs. Jackson, 8 Fed. Cases No. 4541, 17 Fed. 1290	4, 5
Farmer, et al., vs. Stillwater Water Co., et al., 86 Minn. 59, 90 N. W. 10	3
Melander vs. County of Freeborn, 170 Minn. 378, 212 N. W. 590	3
People of Sioux County, Nebraska, vs. National Surety Co., 276 U. S. 238, 72 L. Ed. 547	6, 8
In the Matter of Walter Peterson, as Receiver of the Interstate Coal Company, Inc., 253 U. S. 300, 64 L. Ed. 919	5, 7
Scatcherd vs. Love, 166 Fed. 53, 91 C. C. A. 639 (6th C. C. A.)	4

STATUTES.

Mason's Minnesota Statutes, 1927, Volume II, Section 7009	3, 7
U. S. C., Title 28, Sec. 725	4

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APPELLANT'S BRIEF.

STATEMENT OF CASE.

A complete statement of the case, in concise form, has been prepared by the United States Circuit Court of Appeals for the Eighth Circuit, and appears on pages 1 to 3, inclusive, of the Certificate, which forms the basis of the question certified to this Court, appearing on pages 3 and 4 of the Certificate, and although not strictly in conformity with the rules, we think it unnecessary to indulge in repetition and here repeat a statement of the case, because the same has been well stated by the Circuit Court of Appeals.

ASSIGNMENT OF ERRORS.

I.

The United States District Court, for the District of Minnesota, erred in holding that it was without power and authority to allow expert fees under the Federal Statutes, and that the Court was without power and authority to exercise any discretion in the matter, for the reason that the Court possessed inherent power to allow expert fees, and for the reason that the allowance of expert fees in Federal Courts is not prohibited by the Federal Statutes and is not contrary to any rule of Court.

II.

The United States District Court, for the District of Minnesota, erred in holding that it was without power and authority to follow the prevailing state practice within the State of Minnesota, and allow to appellant expert fees, and that no discretion was vested in the Court permitting it to follow the state practice, for the reason that the Court possessed, not only the power and authority, but the discretion, as well, to follow the state practice and to allow appellant expert fees.

ARGUMENT.

THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MINNESOTA, POSSESSED THE POWER, AUTHORITY AND DISCRETION TO FOLLOW THE PREVAILING STATE PRACTICE WITHIN THE STATE OF MINNESOTA, WHICH IS TO THE EFFECT THAT EXPERT FEES ARE ALLOWABLE IN THE DISCRETION OF THE TRIAL COURT, AND AS THE ALLOWANCE OF EXPERT FEES IS NOT PROHIBITED BY EITHER THE FEDERAL STATUTES OR COURT RULE, THE COURT POSSESSED THE INHERENT POWER TO ALLOW THE SAME.

In the state courts of Minnesota, the allowance of expert fees is discretionary with the trial court as to the amount to be taxed.

Section 7009 of *Mason's Minnesota Statutes for 1927*, Volume II, provides:

> "The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any professional calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In *Farmer, et al., vs. Stillwater Water Co., et al.*, 86 Minn 59, 90 N. W. 10, the Supreme Court of Minnesota held:

> "Hydraulic engineers, called as witnesses to testify to the nature, cost, and efficiency of the water system, were experts, and entitled to reasonable fees as such."

In *Melander vs. County of Freeborn*, 170 Minn. 378, 381, 212 N. W. 590, the Supreme Court of Minnesota said:

> "An appeal comes to us from the order of the Court refusing to allow expert witness fees for a civil engineer, whom plaintiffs called as an expert witness.

> Whether such fees are to be allowed, rests exclusively with the trial court. It is entirely a discretionary matter. * * * These cases do not hold that a civil engineer may not be allowed expert fees for appearing as a witness in court, but relate to services involved in preparation for trial. As a witness in court he is the same as any other expert. Since, however, the question upon its merits rests with the trial court, the party may, if so advised, make a further application for an allowance."

It has been the practice in the state courts of Minnesota for many years to allow reasonable expert fees, which are added to taxable costs and become a part of the judgment, and in most counties within the State of Minnesota, the sum of $25.00 per day is the usual amount allowed to an expert witness.

The laws of the State of Minnesota apply in actions tried in the Federal Court of Minnesota, with respect to the allowance of expert fees.

Section 725 of Title 28, *United States Code Annotated*, provides as follows:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States in cases where they apply."

Scatcherd vs. Love, 166 Fed. 53, 91 C. C. A. 639 (6th C. C. A.).

Bone vs. Walsh Construction Co., 255 Fed. 901. (Dist. Ct. Ia.).

Ethridge vs. Jackson, 8 Fed. Cases, No. 4541, 17 Fed. 1290.

In *Ethridge vs. Jackson, supra,* the Court said:

"I think that giving or withholding costs in a particular case is not a mere matter of practice. Costs are of the substance of the controversy and not the form. They are a part of a judgment and affect the right of the party as well as the recovery of the principal sum or thing. Therefore, I agree with Mr. Justice Woodbury in *Hathaway vs. Roch* (Cir. Mass., 1847), 11 Fed. Cases, No. 6213, that the subject of who shall recover costs in a common law action is within the purview of Section 34 of the Judiciary Act, which provides: 'The laws of the several states * * * shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply.' The cases upon this subject are meagre and not satisfactory or in accord. In my judgment it is clear that the right to costs in this action, not the mere mode of taxing them for enforcing such right, depends upon the laws of this state, because Section 34 of the Judiciary Act makes such law the rule of decision herein, the rule by which the rights of the parties are ascertained and measured in respect to all matters which enter into and form part of the judgment or are determined by it."

Because the allowance of expert fees is not prohibited by the Federal Statute, and the rule of the Federal Court does not prohibit such allowance, it would seem that the Court possesses the inherent power to allow such fees as may be necessary to secure an intelligent consideration of a case.

In the Matter of Walter Peterson, as Receiver of the Interstate Coal Company, Inc., Petitioner, 253 U. S. 300, 64 L. Ed. 919, it was held by the United States Supreme Court that the fees of an auditor in a law action might be allowed

as costs, and the Court said (page 317, U. S. Rep.):

> "As there is no statute, Federal or state, and no rule of court excluding auditor's fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."

In *People of Sioux County, Nebraska, vs. National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547, the Supreme Court of the United States held that, since the law of Nebraska provided that an attorney's fee might be taxed as costs, the Federal Court could include such a fee in a judgment in a case removed from the state court of that state, and in such opinion, the United States Supreme Court said (page 243, U. S. Rep.):

> "Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its court in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the Federal Courts.
>
> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S., §§ 823, 824.
>
> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S., §§ 823, 824. That the particular

mode of enforcing the right provided by the state statute—*i. e.*, by taxing the allowance as costs—is not available to the Federal Courts under R. S., §§ 823, 824, does not preclude the recovery. Since the right exists the Federal Courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment."

In *Business Men's Assur. Co. of America vs. Campbell*, 18 Fed. (2d). 223 (8th C. C. A.), this Court held:

"The statutory provisions as to costs to be taxed in a Federal Court apply to costs in ordinary meaning, and do not prevent enforcement in that court of a state statute authorizing allowance of attorney's fees in certain cases, because it provides that they shall be taxed as costs."

It would appear, therefore, that an expenditure ordered by the Court for the purpose of securing an intelligent consideration of an action at law may be taxed against the losing party, unless that is prohibited by statute. It would also appear that, where it is the practice and policy of a state to permit certain fees to be allowed by the Court and added to the judgment as costs or otherwise, the Federal Courts are not precluded from making such allowance, if the fees are not "costs in the ordinary sense of the traditional, arbitrary and small fees of court officers" and the like.

In the *Peterson* case, *supra*, it is pointed out that "the allowance of costs in the Federal Courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes," and that as to costs not covered by Federal Statutes, the Courts will follow the state laws.

Expert fees allowed by Section 7009 of *Mason's Minnesota*

Statutes for 1927, Volume II, are not ordinary costs. The state law recognizes the fact that in many cases, in order that the facts may be intelligently presented to a jury, the parties must produce expert witnesses whose opinions cannot be obtained for the small sums allowed by law for ordinary witnesses. The allowance of expert fees seems analogous to the allowance of attorney's fees in the case of *People of Sioux County, Nebraska, vs. National Surety Co., supra.* It differs somewhat from the allowance to the auditor in the Peterson case, *supra*, because the experts were not ordered produced by the Court. The allowance of expert fees under the state statute is a recognition of the necessity of expert witnesses for an intelligent disposition of a case.

This action was under the Federal Employers' Liability Act and was properly triable in either the Federal or State Courts in Minnesota. Had the case been tried in the State Court, such court would have allowed expert fees, and it seems to us that the state statute should be allowed, otherwise appellant is penalized for instituting and proseeuting her case in the Federal Court.

Upon this appeal, there is no question involved except the question of whether or not expert fees can be properly allowed because the Court provided that if he possessed the power or authority to allow expert fees, either under the Federal Statutes, or by following the Minnesota state practice, that he would allow the sum of $525.00 and that in the event this Court determined that he possessed such power, that such sum of $525.00 should be added to the judgment in appellant's favor.

CONCLUSION.

Appellant respectfully submits that the United States District Court, for the District of Minnesota, erred in denying her application to tax expert fees against appellee, because such Court possessed the power, authority and discretion to follow the state practice, and as expert fees are not prohibited by either Federal Statute or court rule, the Court has the discretion and power to allow the same.

Wherefore, appellant respectfully prays that the decision of the United States District Court for the District of Minnesota be set aside and reversed by this Honorable Court.

Respectfully submitted,

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ADDITIONAL CITATION.

Expert fees may be taxed under Maine statute. *Aetna Life Insurance Company* v. *Allen, 32 Fed. (2d) 490 at 494.* "The court's allowance as part of plaintiffs' cost of expert fees under R. S. Me. c. 118, Sec. 9, was correct. Compare Primrose *v.* Fenno (C. C.) 113 F. 375; Michigan Aluminum Foundry Co. *v.* Aluminum Co. of America (C. C.) 190 F 903."